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IN THE

Supreme Court of the United States

ANTHONY HAMPTON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Indianapolis police received four 9-1-1 calls in rapid succession after shots were fired near a shopping center. Officers quickly responded, secured the scene, and took two men into custody. Nearly ten minutes later, a fifth person called 9-1-1 claiming he was looking at "the shooter." The caller had not witnessed the shooting and did not describe any criminal conduct by the person he called about. He had a prior felony conviction for falsely reporting a shooting to 9-1-1. He was not asked his name and refused to give his location. His description of "the shooter" conflicted with all four prior calls and with the description of the two men police had in custody. He did not claim to be in danger. The civilian 9-1-1 operator he spoke with was instructed by an officer on the scene *not* to dispatch officers based on the caller's report. Despite this instruction, the operator directed responding officers to reverse course and stop a vehicle carrying the man the caller identified at a different location

Two questions are presented:

1. Whether a civilian 9-1-1 operator has the legal capacity to form reasonable suspicion and direct officers to act on it?

2. Can a "presumption of reliability" that relaxes or suspends the reasonable suspicion requirement of *Terry v. Ohio*, and allows officers to "act now, verify later," be applied to all 9-1-1 calls in the absence of an immediate threat of harm?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Anthony Hampton, respectfully asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review that court's judgment and opinion entered November 4, 2009.

INTRODUCTION

This case presents important Fourth Amendment questions raised by a scenario that occurs dozens, if not hundreds, of times a day—namely, a call to a 9-1-1 operator providing information about general criminal conduct. This Court has long acknowledged that officers responding to information about a dangerous situation should not "delay in the course of an inves-

tigation *if to do so would gravely endanger their lives or the lives of others." See Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298 (1967) (emphasis supplied). But the Seventh Circuit's opinion in this case paradoxically used the increased ability of police departments to quickly receive and disseminate information to officers as justification to *relax* the requirement of reasonable suspicion, and to allow police to act on an informant's tip without verifying its accuracy. The Seventh Circuit did so based not on any grave or imminent threat of harm to the public, but on the general notion of public endangerment it thought inherent in *all* 9-1-1 calls.

Review should be granted to allow consideration of two important questions that will commonly arise in 9-1-1 calls. The first is whether the decision that reasonable suspicion exists may be made by an unsworn and untrained civilian operator, or, as the Second, Sixth and Tenth Circuits have held, the "collective knowledge doctrine" requires that information relied on to form reasonable suspicion be known to sworn law enforcement officers.

The second important question concerns the nature and immediacy of the danger that must be present to lower the *Terry* standard. The Seventh Circuit's holding that sufficient urgency arises from the mere fact that information comes to a police department by way of a 9-1-1 caller conflicts with holdings of this Court and other lower courts. By accepting less than grave and immediate danger to allow police to pursue an anonymous tip without any duty to corroborate or investigate, the Court of Appeals opened the door to exactly the type of danger presented in this case, *i.e.*, the handing over of control of police actions to a person whose tip was demonstrably inconsistent with

information provided by disinterested eyewitnesses and his own later testimony, and who had a prior conviction for lying in the same situation to boot. The Court should grant review to provided needed guidance to law enforcement officers regarding this frequently occurring scenario.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, reprinted in the appendix to this petition (Pet. App. 1a-21a), is reported at *United States v. Hampton*, 585 F.3d 1033 (7th Cir. 2009). The opinions of the United States District Court for the Southern District of Indiana of May 14 and 18, 2007 denying Petitioner's motion to suppress evidence and motion for reconsideration of its suppression ruling in *United States v. Hampton*, No. IP 06-183-CR-01-T/F (S.D. Ind.) are unreported, but are reprinted in the appendix to this petition (Pet. App. 25a-35a and 36a-39a).

JURISDICTION

The Seventh Circuit's opinion and judgment were issued on November 4, 2009. Petitioner's petition for rehearing, with suggestion of rehearing *en banc*, was denied on December 3, 2009. Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, the Court granted Petitioner's request to extend the time to file this petition until April 19, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., Amend. IV.

STATEMENT OF THE CASE

On the afternoon of July 13, 2006, shots were fired in a parking lot behind a Subway restaurant in Indianapolis, Indiana. Shortly thereafter, a number of individuals called 9-1-1. The first caller gave her name and reported hearing "a string of gunshots," though she did not see any shots fired. She reported seeing two African-American men flee the scene, one wearing "black shorts and a black shirt." She also reported the men getting in and out of a vehicle in the Subway parking lot.

A second 9-1-1 call came eleven seconds after the first. That caller also identified himself and reported having heard six or seven shots. He told the 9-1-1 operator, "I suspect the thing is over with now," and "I'm looking now and [there] doesn't seem to be anything going on." This caller described a black man with a gun wearing a dark short-sleeved shirt. A third 9-1-1 call began one second later. This caller claimed to be in the Subway restaurant, and reported that individuals had been shooting from an orange vehicle, possibly a van.

Police were dispatched and arrived on the scene moments later. Four minutes after her initial call, the first 9-1-1 caller phoned again. She reported that officers had just allowed one of the individuals involved in the shooting to walk right past them—an African-American man in "black shorts and black shirt." The caller confirmed to a 9-1-1 operator that this individual was one of two men who had been in the "orange van." The operator communicated the report to officers on the scene. In response to a question from an officer relayed by the operator, the caller confirmed that this suspect had white beads in his hair. That suspect, and another with him, were taken into custody shortly thereafter.

Approximately five minutes later, a fifth 9-1-1 call came in. This caller—later identified as Anthony Smith—initially told a 9-1-1 operator that he wanted to "tell [an] officer that this guy is the shooter." In fact, Smith had not witnessed the shooting; he was in his mother's house blocks away when the shots were fired. After hearing the shots, Smith remained in his mother's house for approximately five minutes before leisurely walking towards a nearby bus stop.

When he called 9-1-1 Smith described his "shooter" as bald, wearing a blue shirt with yellow stripes and blue jeans. Although Smith would later claim at trial that he immediately recognized the suspect as Petitioner Hampton, whom he had known for years, and although Smith described his suspect's appearance several times during his eleven minute 9-1-1 call, Smith never identified the suspect by name, testifying later that he thought that detail unimportant. Nor did he report seeing a weapon or any ongoing

criminal activity.[1] Instead, the only conduct he attributed to this suspect was standing next to two buildings talking on a cell phone. He was never asked how he knew the man was "the shooter."

Smith was also never asked to identify himself. When asked to give his location, Smith refused. Because Smith was speaking on a cell phone, police could not independently determine his whereabouts or name. (Had Smith been asked to identify himself, the 9-1-1 operator might have learned that Smith had a prior felony conviction for falsely reporting a shooting to a 9-1-1 operator from a pay-phone only six blocks away from the location of his current call.) And although he expressed a desire not to make himself known to the person he was watching, he never claimed to be in any danger; instead, at trial he admitted that "he was more concerned with getting this person caught."

With Smith still on the line, the 9-1-1 operator contacted an officer at the Subway shooting scene. The operator told the officer that she had a caller who knew where "the shooter" was, and asked permission to broadcast a report over the main police radio channel. Since the operator had not been told of any criminal activity by the caller, she had none to describe to the officer. When the officer learned that the caller had refused to give his location, he told the operator *not* to pass along the report, but instead to try to determine where the caller was so that officers could make "a positive ID." The officer also told the

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[1] At trial Smith testified he had seen a gun in Petitioner's hand, but on the 9-1-1 call he only said he saw a cell phone. Smith claimed at trial that the gun he saw was "a black gun." The gun seized when petitioner was stopped, and for which he was indicted and convicted, was a chrome revolver.

9-1-1 operator that police already "ha[d] 2 subjects in custody." Two men matching descriptions given by identified eyewitnesses were already in custody, and no prior 9-1-1 caller had reported a third person as being involved in the shooting. Apparently relying on Smith's assertions, the 9-1-1 operator argued that "[t]he other guy that was shooting, the[y] don't have him in custody."

Seconds after the field officer had instructed the 9-1-1 operator not to broadcast information based on Smith's call, Smith told the operator that his suspect was leaving the area in a white SUV. Without consulting any officers, the operator immediately broadcast a dispatch report telling officers that "[the] guy who was doing the shooting has left northbound on Pennsylvania in a white SUV. . . ." Based entirely on this dispatch report, officers in the area first followed and then pulled over a white SUV on Pennsylvania Avenue. With guns drawn, officers ordered the driver and a passenger out of the vehicle and placed them in handcuffs. The passenger was Petitioner Hampton. Officers then searched the vehicle and found two handguns. One was located under the driver's seat. The second, a chrome Smith & Wesson revolver, was found in the driver's side foot well of the third row of passenger seats.

Petitioner Hampton was charged with possessing the chrome Smith & Wesson revolver. Prior to trial, Petitioner moved to suppress the revolver. The District Court denied Petitioner's motion to suppress and his motion to reconsider, Pet. App. 25a-35a, 36a-39a, and the revolver was admitted into evidence at his trial.

Anthony Smith, the final 9-1-1 caller, admitted at trial that he had previously been convicted of a felony for falsely reporting a shooting to a 9-1-1 operator. Although he never mentioned a weapon at any point during his eleven-minute 9-1-1 call, Smith testified at trial that Petitioner was the man he saw talking on a cell phone, and claimed he had been holding a gun in his other hand the whole time. Smith explained that he did not tell the 9-1-1 operator (whom he had called about a shooting) that this suspect was holding a gun because he did not "think it was important." He also described the gun he allegedly saw as a black handgun like "the type of gun an officer would carry," that is, a fairly compact square-shaped 9mm semi-automatic handgun rather than the large round chrome revolver Petitioner was charged with and convicted of possessing. Smith also testified that, although he immediately recognized the "shooter" as Petitioner at the time of his 9-1-1 call, and though he described the "shooter" in detail to the operator, he never told her Petitioner's name because he did not think that was important either.

Petitioner Hampton was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). He was sentenced to 387 months of imprisonment as an armed career criminal under 18 U.S.C. § 924(e). On appeal the Seventh Circuit affirmed Petitioner's conviction, rejecting his Fourth Amendment arguments that: (1) the civilian 9-1-1 operator lacked capacity to form reasonable suspicion when she directed officers to stop the white SUV; and (2) Smith's anonymous and uncorroborated call did not

provide reasonable suspicion to stop and seize Petitioner.[2]

In rejecting Petitioner's claim that the unsworn and untrained 91-1 operator was without legal capacity to determine whether reasonable suspicion existed, the Court of Appeals did not expressly address the fact that the only thing that occurred after the field officer instructed the operator not to send Smith's report to other officers (because Smith refused to give his location) was that Smith had reported that Petitioner was getting into a vehicle. Instead, the Court focused on the information that was in the hands of the officers in the field, including information that came from other callers about people who did not match Petitioner's description or whereabouts. Pet. App. 10a. Although the court held that the officers collectively "determined[d] they had reasonable suspicion," *id.*, the court pointed to nothing in the record that reflected that determination, collectively or individually. Nor did the court explain how the police stop of the SUV was the result of anything other than the dispatcher acting on Smith's information that Petitioner was getting into an SUV after she (the operator) had been told from the field not to broadcast it.

The Court of Appeals also rejected the claim that Smith's tip, anonymous at the time of the stop of the SUV, did not provide reasonable suspicion to stop and seize him. The court did not hold that police had enough information to satisfy *Terry v. Ohio*, 392 U.S. 1 (1968), under non-emergency circumstances;

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[2] The court did vacate Petitioner's sentence and remand for a resentencing without the Armed Career Criminal enhancement. Pet. App. 18a-21a.

instead, it relieved police of the requirement that they determine the reliability of Smith's tip because his call to 9-1-1 presented an "urgent" situation. Pet. App. 7a-8a. And the court expressly rejected application of the Court's holding in *Florida v. J.L.*, 529 U.S. 266 (2000), that an anonymous tip had to have some reliable and "predictive" information that could be tested by officers before they acted on it. Pet. App. 6a-7a. In so doing, the court did not cite any information suggesting that anyone was actually in imminent or grave danger when Smith called five minutes after police had secured the scene and arrested two suspects matching the description of the only callers who had seen the gunfire. Instead, the Court of Appeals based its holding that police could pursue Smith's tip immediately, and verify its reliability later, on the mere fact that it was a call made to a 9-1-1 operator, *i.e.*, that calls to 9-1-1 categorically present the sort of urgency that suspends, or at least relaxes, the requirement that police determine an anonymous tip to be reliable before they act on it. *See* Pet. App. 7a ("[W]hen officers respond to a 911 call, there is less need for verification of the caller's identity before acting because of the urgency of the situation.") (citation omitted); Pet. App. 9a ("Emergency dispatchers are in no position to conduct background checks while gathering information about a crime in progress").

Petitioner Anthony Hampton now seeks a writ of certiorari from this Court to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit affirming his conviction.

REASONS FOR GRANTING THE WRIT

There are three reasons for this Court to grant a writ of certiorari in this case. First, in applying the collective knowledge doctrine to the actions of an unsworn police operator the Seventh Circuit's opinion conflicts with this Court's holdings in *United States v. Hensley*, 469 U.S. 221 (1985) and *Whiteley v. Warden, Wyoming State Penitentiary*, 401 U.S. 560 (1971), and with decisions of at least four Circuit Courts of Appeal. *See United States v. Colon*, 250 F.3d 130 (2d Cir. 2001); *Feathers v. Aey*, 319 F.3d 843 (6th Cir. 2003); *United States v. Grigg*, 498 F.3d 1070 (9th Cir. 2007); *United States v. Shareef*, 100 F.3d 1491 (10th Cir. 1996). The Court has long applied the collective knowledge doctrine to allow the reasonable suspicion of one sworn officer to be imputed to other officers. *Hensley*, 469 U.S. at 231. It is critical to the application of this doctrine, though, that the information claimed to constitute sufficient cause be known to *law enforcement officers*—not merely to anyone associated with the police. *See, e.g., Colon*, 250 F.3d at 136 (civilian 9-1-1 officer could not assess reasonable suspicion to dispatch police without officer direction). The Seventh Circuit's opinion upheld a stop prompted solely by an operator's instruction to officers after an officer in the field had expressly *rejected* Smith's information as insufficient to justify stopping the suspect until officers could assess Smith's reliability. Review should be granted to resolve the conflict among the circuits regarding this issue.

Second, the Seventh Circuit's application of a presumption of informant reliability to all calls received by 9-1-1 operators, regardless of whether the urgency of the situation would actually make further inquiry dangerous, conflicts with this Court's exigent

circumstances jurisprudence, including *Florida v. J.L.*, 529 U.S. 266 (2000) and *Davis v. Washington*, 547 U.S. 813 (2006). It also conflicts with decisions of the Second, Fourth, Ninth, and Eleventh Circuits, creating inconsistency in this important area of Constitutional law. *See, e.g., Anthony v. New York*, 339 F.3d 129 (2d Cir. 2003); *United States v. Reaves*, 512 F.3d 123 (4th Cir. 2008); *United States v. Terry-Crespo*, 356 F.3d 1170 (9th Cir. 2004); *United States v. Holloway*, 290 F.3d 1331 (11th Cir. 2002). A true "emergency situation," one that allows police to act immediately to protect someone's health and safety (including their own), arises where an immediate threat of harm to someone is present. The Seventh Circuit's presumption, that all calls to 9-1-1 (or even all calls that concern recent criminal activity) present the sort of exigency that categorically justifies relaxing the *Terry* standard does not balance safety against the need to investigate. It was this balancing that prompted the Court, in cases like *J.L.*, to require genuine urgency before releasing officers from their obligation to determine whether information supplied anonymously has some level of reliability before using that information in derogation of a suspects' right to be free from search or seizure. Review of this holding is appropriate given the frequency with which these circumstances arise.

Finally, guidance regarding the appropriate standards for the use of anonymous 9-1-1 reports to justify warrantless searches or seizures is urgently warranted given the advances in electronic information systems and telecommunications methods made since this Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968). The need for consistent and workable rules for the use of rapidly available information received by detached 9-1-1 operators relying on new and ad-

vanced media presents this Court with a matter of exceptional importance in a context that arises daily in almost every police jurisdiction.

I. UPHOLDING A *TERRY* STOP AT THE DIRECTION OF AN UNSWORN POLICE OPERATOR, UNACCOMPANIED BY A DETERMINATION BY AN OFFICER THAT REASONABLE SUSPICION EXISTED, PLACED THE SEVENTH CIRCUIT IN CONFLICTS WITH HOLDINGS OF THIS COURT AND OTHER CIRCUITS.

After Anthony Smith told her that he was looking at "the shooter," the Indianapolis 9-1-1 operator relayed this information to an officer in the field and asked to broadcast it generally so that officers could stop Smith's suspect. She was told by the officer she contacted that, with two suspects already in custody, she should *not* do so unless Smith would provide his location so that officers could first meet with him to assess his reliability. When Smith told her his suspect was getting into a vehicle, though, she directed officers to pursue him without further consultation. In upholding this stop, the Seventh Circuit placed itself in conflict with holdings of this Court, and other circuits, that have restricted these decisions to sworn and trained officers.

The collective knowledge doctrine allows the knowledge of groups of officers involved in an investigation of criminal activity to be pooled in determining whether cause for police action exists. In *Whitely v. Warden*, 401 U.S. 560, 568 (1971), for example, the Court held that officers from one department could rely on a radio dispatch from another to stop and search a suspect matching the description in the dispatch, although the Court ultimately determined

that the initial complaint and arrest warrant upon which the dispatch was based was not supported by probable cause. The Court first applied what became known as the "collective knowledge doctrine" to assessments of reasonable suspicion in *United States v. Hensley*, 469 U.S. 221, 232 (1985). Whether reviewing a determination made by one officer or reflected in the collective knowledge of two or more, though, the Court has assessed what sworn and trained *police officers* knew, rather than which was known by *anyone* involved in the process. *See, e.g.*, *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (courts "look at the totality of the circumstances of each case to see whether *the detaining officer* has a particularized and objective basis for suspecting legal wrongdoing. . . . This process allows officers to draw on *their own experience and specialized training* to make inferences from and deductions about the cumulative information available to them that might well *elude an untrained person.*") (emphasis supplied; citations and internal quotation marks omitted). While willing to evaluate the knowledge of officers collectively, the Court has required that this knowledge be filtered through the training and experience of sworn officers to reflect a professional determination of cause that will satisfy the Fourth Amendment.

Lower federal courts have done the same. Addressing reasonable suspicion arising out of dispatch reports from civilian operators, the Second Circuit held that civilian 9-1-1 operators are not competent to form reasonable suspicion:

> Imputing information known only to the civilian operator and not conveyed to the dispatching and then arresting officers would extend the [*Terry*]

> doctrine beyond its current jurisprudential parameters and vitiate the privacy safeguards of the Fourth Amendment and their requirement that an officer may conduct a *Terry* stop only if the officer has a reasonable suspicion supported by articulable facts, by permitting a search where no law enforcement officials ever had sufficient information to provide a reasonable suspicion for the search.

Colon, 250 F.3d at 137 (citing *United States v. Sokolow*, 490 U.S. 1, 7, (1989)) (citation and internal quotation marks omitted). Other Circuits agree. *See Feathers v. Aey*, 319 F.3d 843, 849 (6th Cir. 2003) ("if the dispatcher lacked sufficient information to satisfy the reasonable suspicion requirement, and the officers' subsequent observations did not produce reasonable suspicion, then the stop violated Feathers' Fourth Amendment rights"); *United States v. Hinojos*, 107 F.3d 765, 767 (10th Cir. 1997) ("a *Terry* investigation in reliance upon a police bulletin is justified only if the bulletin itself is based on reasonable suspicion, [citation omitted], or is augmented by independent police corroboration").

In a line of cases leading to this one, by contrast, the Seventh Circuit has accepted unsworn 9-1-1 operators as "part of the police collective" capable of assessing probable cause even in the absence of the training and experience associated with sworn officers. *See United States v. Whitaker,* 546 F.3d 902, 910 n. 12 (7th Cir. 2008) (citing *United States v. Drake*, 456 F.3d 771, 775 (7th Cir. 2006)). In so holding, the Seventh Circuit has written the requirement of "experience and specialized training" reflected in cases like *Arvizu* out of the reasonable suspicion analysis, instead allowing anyone who works for the

police to make the determination. The Seventh Circuit's view is inconsistent with the Court's longstanding willingness, reflected in cases going as far back as *Terry*, to uphold police action based on far less that certainty in reliance on the experience and training of sworn officers.

This case also demonstrates the hazards posed by the Seventh Circuit's view. In rejecting Petitioner's argument that it was the operator alone who decided to send officers after him, the Seventh Circuit focused on the collective knowledge of all department personnel involved. Pet. App. 10a. But the Court cited no intervening information received between the time the officer told the operator that Smith's anonymous tip did *not* justify action, essentially a determination that reasonable suspicion did *not* exist, and the time she directed officers to act, except for the suspect's entry into a vehicle. Accordingly, the Seventh Circuit's holding necessarily accepted the operator's determination that stopping Petitioner was warranted, since she was the only one who made such a decision. In so doing, the court rejected the decision made by the sworn officer in favor of that of the untrained operator.

The issue of a civilian 9-1-1 operator's capacity to form reasonable suspicion also overlaps with the second question presented in this petition—namely, under what "emergency" circumstances is relaxing or suspending the verification component of the reasonable suspicion requirement justified? In this case, the 9-1-1 operator not only made the decision that sufficient cause existed to stop Smith's suspect; her decision also necessarily encompassed consideration of whether the situation was sufficiently threatening to anyone's safety to lower that cause

standard. Her decision thus involved the interrelationship of two factors, cause and exigency, both of which sworn, trained and experienced officers are suited to assess, but telephone operators are not. Indeed, because the only thing that happened after the operator was told not to broadcast instructions to stop the suspect is that he got into a vehicle, it appears that the operator's concern (like Mr. Smith's) was fear that he might not be caught, a factor that implicates neither cause to believe he had actually done anything wrong nor immediate danger to anyone. The officer in the field properly assessed these factors and determined that Smith's tip required further verification. If the Seventh Circuit's opinion is not reviewed, there will be no assurance that these complex decisions, well suited to trained officers, will remain in their hands.

II. THE SEVENTH CIRCUIT'S HOLDING IMPROPERLY PERMITTED EXIGENCY TO BE INVOKED WITHOUT REAL DANGER TO ANYONE.

In 1963, then – Judge Burger addressed the flexibility conferred by the Fourth Amendment to allow police officers the authority to act quickly, based on limited information, when human life is at stake:

> [A] warrant is not required to break down a door to enter a burning home to rescue occupants or extinguish a fire, to prevent a shooting or to bring emergency aid to an injured person. The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.

Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir. 1963). The Court adopted a similar approach in

Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 298 (1967), holding "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." Following the *Hayden* decision, many federal and state courts upheld warrantless searches and seizures in emergency situations where delay would have genuinely endangered someone's safety. *See, e.g., Holloway*, 290 F.3d at 1336-37 (listing cases).

In *Florida v. J.L.*, however, the Court distinguished between reports of present danger and those of mere criminal activity, holding that the corroboration requirements remain intact where police receive a report of information about a crime rather than an urgent call for immediate assistance. *J.L.*, 529 U.S. at 273 ("[w]e do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk"). The facts of *J.L.* did not require the Court to speculate about how imminent the danger must be to justify police action without first weighing the reliability of information it would be based upon. This case presents that question.

Exigency arises in many different contexts. Although *Davis v. Washington*, 547 U.S. 813 (2006), addresses the operation of the Sixth Amendment rather than the Fourth, the decision is nonetheless instructive. Considering the admissibility of out-of-court statements of witnesses, the Court held that statements made to the police "are testimonial when the circumstances objectively indicate that there is no [. . .] ongoing emergency, and that the primary purpose of the interrogation is to establish or prove

past events potentially relevant to later criminal prosecution." 547 U.S. at 822. The question which naturally flows from *J.L.* and *Davis* is: what constitutes an emergency? The answer defies a bright line rule, and certainly one like the Seventh Circuit adopted, which depends not on the circumstances surrounding the tip, but instead on to whom the tip was provided. Nonetheless, the question represents the sort of decision officers make all the time. Clarification regarding the factors used to determine where particular circumstances fall along the urgency continuum is warranted to assist them in doing so.

Inconsistencies in the line of cases from the Seventh Circuit leading to the conclusion that 9-1-1 calls are, by definition, urgent enough to justify action without verification illustrates the need for this guidance. In *United States v. Drake*, 456 F.3d 771, 772-73 (7th Cir. 2006), the Seventh Circuit held that reasonable suspicion existed to stop and search a vehicle matching a 9-1-1 report after a caller reported that she had just seen an occupant threaten her son-in-law with a gun. Police responded within two minutes to stop the vehicle. *Id.* at 773. The Seventh Circuit distinguished *Drake* from *J.L.*, noting that the "911 call reported an immediate threat to public safety," and police "were not confronted with any reason to doubt [the caller's] report, and thus the presumption remained intact." 456 F.3d at 775. In *Drake* the Seventh Circuit first recognized the "presumption of reliability" in a case where the emergency was clear: a threat of immediate physical harm by an armed man, contemporaneously reported and unrebutted.

The court's decisions in *Hicks* and *Wooden* followed suit, but each expanded the presumption to situations containing less immediate threats and/or less

reliable reports, and each thus eroded the protections of the verification requirement. In *United States v. Hicks*, 531 F.3d 555, 557 (7th Cir. 2008), a 9-1-1 caller reported "a guy beating up a woman in my house," noting that "the man in question had a pistol and had threatened to shoot the woman." While the 9-1-1 call in *Hicks* presented an immediate threat of ongoing harm, the call was riddled with internal inconsistencies. *Id.* Nonetheless, the Seventh Circuit held that the threat of harm to the woman in the caller's house justified immediate police action. *Id.*

In *United States v. Wooden*, 551 F.3d 647, 648 (7th Cir. 2008), the Seventh Circuit addressed facts more like those of *J.L.* Police received an anonymous 9-1-1 call stating:

> I would like to report a black male with a silver hand gun. He *was* arguing with his, ah, girlfriend, or whatever. . . . They were walking toward [the] 7-Eleven on Miami [Street]. He's tall. He's wearing a black jacket and blue jean pants. He has the gun on a holster. And I seen him pull it out.

551 F.3d at 648 (emphasis added). Police responded and found the couple not arguing, but eating snack food. *Id.* Despite *J.L.'s* mandate that an anonymous tip that a person carrying a gun is not, without more, sufficient to justify a stop and frisk of that person, 529 U.S. at 270-71, the Seventh Circuit found that immediate action was proper because, in its view, "911 calls reporting an ongoing crime must be treated differently." *Wooden*, 551 F.3d at 649. Explaining that essentially *all* 9-1-1 calls reporting *any* ongoing criminal activity deserve a "presumption of reliability," the Seventh Circuit transformed a presumption activated by specific facts demonstrating real

exigency to a categorical one based on the phone number dialed by the tipster:

> A 911 system designed to provide an emergency response to telephonic tips could not operate if the police had to verify the identity of all callers and test their claim to have seen crimes in progress. A process of testing would frustrate the expedition that often is essential to protect lives and safety. . . . So we reiterate the holding of *Drake* and *Hicks* that a need for dispatch can make reasonable a stop that would not be reasonable if the police had time to investigate at leisure.

551 F.3d at 650.

Missing from the Seventh Circuit's calculus was any requirement that a 9-1-1 report identify a present threat of harm. While a report of past or non-emergency criminal conduct may call for an expeditious response by police, the need to investigate crime and apprehend criminals is not the same as the need to act to protect public safety. One can imagine a tip reporting a banker laundering money, even at that moment. Could police enter the banker's home or office and search him without first verifying the tip's reliability? Under the Seventh Circuit's framework, if the tip came to a 9-1-1 operator the answer is apparently yes.

In this case, for example, Anthony Smith's 9-1-1 call came after police had secured the shooting scene. He reported a new suspect after all other callers had reported only two suspects, and police had two men in custody. Most importantly, Smith did not report an ongoing crime or danger. The second 9-1-1 caller, who spoke with an operator some five minutes *before*

Smith called, had already said he was "way too late" in calling because there "[didn't] seem to be anything going on." And Smith's later-avowed purpose was not to appeal for protection for himself or anyone else; it was instead to identify a suspect in a completed crime, and to have the suspect arrested. Thus in this case, the Seventh Circuit completed its trip from the armed man threatening another person with a gun in *Drake*, to the armed man who had just been waving a gun and arguing with his girlfriend in *Wooden*, to the unarmed man (Smith never mentioned a gun during his 9-1-1 call) standing on a corner talking on a cell phone 10 minutes after police had secured the scene. In this progression, the court has steadily extended its rationale further each time, finally applying a "presumption of reliability" sufficient to stop and search a person based on a 9-1-1 call reporting a completed crime, absent ongoing criminal conduct, even where the report contradicts prior reports.

While the Seventh Circuit has been moving down the aforementioned path, other Circuits have gone a different way, creating a circuit split in need of resolution. In *United States v. Reaves*, 512 F.3d 123 (4th Cir. 2008), the Fourth Circuit held that no reasonable suspicion existed to stop and search a vehicle after a 9-1-1 caller reported that she had just witnessed a drug transaction take place, and that suspect had a gun. 512 F.3d at 125. The caller even followed the suspect in her car, providing police with a blow-by-blow account of his location. *Id.* Similarly, in *United States v. Colon*, 250 F.3d 130 (2d Cir. 2001), the Second Circuit overturned a conviction where a 9-1-1 caller had reported that a suspect, located in a crowded bar, had just hit her in the head with a gun. Although the case was coded as a "crime in progress," the Second Circuit held that police lacked reasonable

suspicion to search the suspect because they did not independently observe any suspicious behavior or criminal conduct once on the scene. 250 F.3d at 132.

In *Feathers v. Aey*, 319 F.3d 843 (6th Cir. 2003), a § 1983 case, the court held that Feathers' Fourth Amendment rights had been violated after police stopped and searched him without reasonable suspicion. Police had received a 9-1-1 call at 1:25 a.m. reporting that a man, who appeared drunk, had pointed something that looked like a gun at the caller and told him to "shut up." 319 F.3d at 846. Relying on this Court's decision in *Hensley*, the Sixth Circuit noted that, although responding officers were unaware "that the dispatcher's information was from an anonymous tipster who offered no evidence of reliability," to the extent knowledge could be imputed, it must be imputed to require additional corroboration. Similarly, in *United States v. Terry-Crespo*, 356 F.3d 1170, 1172 (9th Cir. 2004), the Ninth Circuit found reasonable suspicion to exist where an identified caller reported that a suspect had just threatened him with a gun, noting the greater degree of reliability afforded to victims of violence, and distinguishing an anonymous call of general criminality.

The positions of the Second, Fourth, Sixth, and Ninth Circuits are consistent with this Court's opinions in *Hensley, J.L.*, and *Davis*. The Seventh Circuit's is not, nor can it be reconciled with those other circuits. To the contrary, the Seventh Circuit's position would turn the Fourth Amendment on its head, allowing police to stop and search any suspect identified in any 9-1-1 call reporting criminal conduct, whether present danger existed or not. Unlike, say, the Fourth Circuit in *Reaves*, which held

that a movement-by-movement description of a suspect's actions after the crime was completed added nothing to the reliability of the accusation of the underlying crime, 512 F.3d at 127, the Seventh Circuit relied in part on Smith's ability to provide a "play-by-play description of the 'shooter's' movements," Pet. App. 9a, even though Smith did not say he saw the suspect do any shooting or even carry a gun. Unable to distinguish the holding in *J.L.* rejecting a tip that merely described someone's location accurately, rather than imparting "knowledge of concealed criminal activity," 529 U.S. at 272, the Seventh Circuit simply declined to apply *J.L.* to an "emergency situation." Pet. App. 7a. But the court identified no immediate threat to anyone; the only factors it cited as supporting the need for immediate action were: (1) that "the gunman had not been caught," Pet. App. 8a (an unwarranted assumption of the court's premise, especially since callers who actually saw the shooting had described two gunmen and police had two suspects in custody); and (2) the fact that Smith had called 9-1-1 ("[W]hen officers respond to a 9-1-1 call, there is less need for further verification of the caller's identity before acting because of the urgency of the situation."), Pet. App. 7a.

While appearing to afford police officers additional flexibility in the performance of their duties, the Seventh Circuit's approach fundamentally undervalues them. The court appears to believe officers incapable of distinguishing an imminent threat from one that has passed, or even has simply become less than immediate, even though the Fourth Amendment, as interpreted by the courts, requires them to do so all the time. In this very case, in fact, the court's holding repudiated the decision reached by the officer first contacted by the 9-1-1 operator, who undoubtedly

applied his training and experience to conclude that, with two suspects in a two-person shooting already in custody, Smith's tip required further investigation before it justified seizing a third, in favor of the decision of a telephone operator with no such training or experience who merely shared Smith's desire to see the suspect arrested. Certiorari is appropriate to resolve the divide between the Seventh Circuit's approach and that of other courts, including this Court, and to guide the police in balancing the immediacy of a threat with the need to investigate.

III. REVIEW IS WARRANTED IN LIGHT OF THE FREQUENCY WITH WHICH CIRCUMSTANCES LIKE THOSE PRESENT IN THIS CASE ARISE.

The divergence between the Seventh Circuit's approach and that of this Court and other lower courts is particularly significant because of the frequency with which the Seventh Circuit's categorical rule can be applied. Calls to 9-1-1 systems number in the thousands every day. Moreover, analysis of their content suggest that, contrary to the Seventh Circuit's faith in them as accurate because they are urgent, there are good chances that 9-1-1 calls are often less urgent than they appear. These facts counsel a case-by-case approach to urgency rather than a categorical one.

For example, the United States Department of Justice, Bureau of Justice Statistics reports that, as of 2004, there were some 17,876 state and local law enforcement agencies with 9-1-1 capabilities in the United States.[3] According to the National Emergency

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[3] Reaves, Dr. Brian A., "Census of State and Local Law Enforcement Agencies, 2004," *Bureau of Justice Statistics Bulle-*

Number Association—relying on Federal Communications Commission statistics—there are an estimated 240 million calls made to 9-1-1 in the United States each year.[4] In Washington D.C. there are nearly 5,000 9-1-1 calls placed each day, and larger cities like Chicago handle roughly 15,000 9-1-1 calls a day.[5]

In many 9-1-1 centers, especially those in large cities, up to 80% of calls constitute non-emergencies.[6] Further, the Department of Justice reports that "Exaggerated Emergency 911 Calls" are a major problem for state and local law enforcement agencies. Sampson, *supra* n. 3, at p. 6. "Exaggerated Emergency 9-1-1 calls" are those in which "callers intentionally exaggerate the seriousness of an emergency to get a quicker police response." *Id.* This problem is generally combated by prosecuting, or threatening to

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tin; NCJ 212749 (June, 2007) (publication *available at*: http://bjs.ojp.usdoj.gov/content/pub/pdf/csllea04.pdf); *see also* Sampson, Rana, "Misuse and Abuse of 911," *Problem-Oriented Guides for Police*, Problem-Specific Guides Series No. 19, Office of Community Oriented Policing Services ("COPS"), United States Department of Justice; (August, 2004) (*available at*: http://www.cops.usdoj.gov/files/RIC/Publications/e07042423_web.pdf) (reporting 183 million 9-1-1 calls per day in 2004).

[4] "9-1-1 Statistics," National Emergency Number Association, Public & Media Section; (April 1, 2010) (statistics *available at*: http://www.nena.org/911-statistics).

[5] 911 Facts & Figures, DISPATCH Magazine On-Line (viewed: http://www.911dispatch.com/info/fact_figures.html); "Mayor Daley Announces Major Upgrade To Chicago's 911 System," Mayor's Press Office (February 19, 2009) (*available at*: http://mayor.cityofchicago.org/mayor/en/press_room/press_releases/2009/february_2009/mayor_daley_announces.html).

[6] *See* 911 Facts & Figures, *supra* n. 5; Sampson, *supra* n. 3, at p. 5. ("In 2001, the San Diego Sheriff's Department reported that more than half of its 911 calls were frivolous").

prosecute, those who falsely report emergencies or crimes to 9-1-1 (like the informant in this case). Such "security measures" have been used by the appellate courts to justify a "presumption of reliability" in 9-1-1 calls.[7]

The Department of Justice, however, has found that "911 misuse is difficult to prove because the caller might simply claim, for instance, that he or she heard shots but did not actually see a gun fired. In other words, the caller knows there is enough room for 'caller error' that he or she cannot be charged (or prosecuted) for the exaggerated 911 call." *See* Sampson, *supra* n. 3, at p. 5-6.

This problem is exacerbated by the increasingly larger number of individuals who use wireless phones to call 9-1-1, making identification of the caller or his location more difficult. In 2004, 25% of all 9-1-1 calls came from wireless phones, a tenfold increase over the number in 1991. Sampson, *supra* n. 3, at p. 6. The Department of Justice estimated in 2004 that, by this year, the total number of wireless 9-1-1 calls would double, from 46 million to 92 million per year, or nearly 40% of all 9-1-1 calls. *Id.* Accordingly, the rationale underlying a "presumption of reliability" in reports to 9-1-1 is undermined, especially where wireless callers cannot be identified after the fact.

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[7] *See, e.g., United States v. Wooden*, 551 F.3d 647, 649-50 (7th Cir. 2008) ("the threat of penalties for lies makes information more reliable"). While admitting "inconsistencies" between Smith's tip and what later turned out to be true, Pet. App. 9a, the Seventh Circuit did not note the irony, in relying on *Wooden* in this case, of presuming reliable an informant who had apparently not been deterred from telling lies by such penalties.

The Seventh Circuit's crediting of 9-1-1 calls as a group because of their necessary urgency is contradicted by these figures, which support the need for evaluating the nature and immediacy of threats to safety one tip, or one call, at a time. Given the frequency with which these situations arise, guidance from the Court would be of material assistance to police as well as of substantial service to Fourth Amendment interests.

CONCLUSION

For the foregoing reasons, Petitioner, Anthony Hampton, respectfully requests that this Honorable Court grant certiorari, reverse the decision of the United States Court of Appeals for the Seventh Circuit, and remand this case for a new trial.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 07-3134

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTHONY HAMPTON,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division.
No. 06-CR-183—John Daniel Tinder, *Judge*.

Argued January 5, 2009
Decided November 4, 2009

Before EASTERBROOK, *Chief Judge*, and POSNER and WILLIAMS, *Circuit Judges*.

WILLIAMS, *Circuit Judge*. A series of 911 calls reporting shots fired in broad daylight led police officers to a busy area in Indianapolis to arrest the gunman. One caller fingered the occupants of a white sports utility vehicle ("SUV"), which carried defendant Anthony Hampton. When officers stopped Hampton and the driver, they recovered two guns. After applying enhancements because of Hampton's

previous felony convictions, the court sentenced him to 387 months' imprisonment. We affirm Hampton's conviction because we conclude that the officers had reasonable suspicion to stop the SUV in which Hampton was riding and that there was sufficient evidence to show that Hampton constructively or actually possessed the gun. As to his sentence, although we agree with the district court that a conviction for residential entry in Indiana qualifies as a "violent felony" for the purposes of the Armed Career Criminal Act ("ACCA"), we conclude that Hampton's prior conviction for criminal recklessness in Indiana does not qualify, and therefore, Hampton must be resentenced.

I. BACKGROUND

Anthony Hampton was charged with possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1). His arrest arose out of events that occurred on July 13, 2006. The Indianapolis Metropolitan Police Department received several 911 calls after someone fired shots in a parking lot behind a Subway restaurant in Indianapolis.

The first 911 call came in at 4:29 p.m., when a woman who identified herself as Monica Drawn called and reported hearing five gunshots outside of her apartment building at 3777 N. Meridian Street. She described two African-American men getting out of an SUV near Subway and standing behind a dumpster. She said one man wore black shorts and a black shirt. Eleven seconds later, a man who identified himself as John Adkins called 911 and reported hearing six or seven shots. He also described seeing an African-American man, wearing a dark, short-sleeved shirt, running with a gun in his hand. One second later, a Subway employee called 911 and

stated individuals were shooting from inside an orange van.

At 4:33 p.m., police arrived at the scene. Drawn called 911 again and reported that the man with the black shorts and shirt whom she had called to report earlier had just walked past police officers. The 911 dispatcher relayed this to officers on the scene, and Drawn was able to verify that the person had white beads in his hair. One minute later, another caller, later identified as Anthony Smith phoned 911 and reported watching the shooter stand between two buildings near Pennsylvania and 38th streets talking on a cell phone. Smith would later testify that he recognized the shooter as Anthony Hampton because he was from the neighborhood. However, he did not report to the 911 operator that he recognized Anthony Hampton or that the person he was watching supposedly was holding a gun. He described the person as a bald, black man wearing blue jeans and a blue shirt with stripes. Smith also reported that he saw the man get into a white Jeep Cherokee with Ohio plates and head northbound on Pennsylvania Street. Smith initially hesitated to meet with the police because he was fearful that the "shooter" saw him. Smith eventually gave the 911 operator his name (albeit after the police initiated the traffic stop), a description of what he was wearing and his location so that officers could speak with him. After officers arrested Hampton, they learned that Smith did not actually witness the shooting.

Meanwhile, officers stopped a white Jeep Commander with Ohio plates after the driver turned

without signaling.[1] The officers asked the two men to get out of the Jeep. One man was the driver, Justin Gray. The other man, later identified as Hampton, was seated in the rear passenger's side seat. Hampton wore a blue shirt with yellow stripes across the chest. One officer would later testify that Hampton was sweating profusely and looked disheveled. The officers searched the Jeep and found two firearms—a black Ruger handgun under the driver's seat and a chrome Smith & Wesson revolver near the rear seat on the driver's side. Police later brought Smith to the scene of the traffic stop, and Smith identified Hampton as the individual he had seen between the buildings.

At about 4:50 p.m., Keith Moore called 911 and reported that he had just witnessed almost the entire event unfold from the roof of his high-rise apartment building where he was relaxing by the pool with a beer. At Hampton's trial, Moore testified that after the initial shot, he stood on a chair at the edge of the pool deck, peered over a fence and witnessed an African-American man firing a large, silver handgun toward an apartment building behind a Subway. He also saw another black man wearing jeans and a blue jacket in the Subway parking lot. He saw the second man enter and leave in a maroon minivan. The gunman stopped and talked to two individuals in front of the Subway, and those two men headed westbound. The gunman then placed the gun in his

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[1] For reasons that are unclear (perhaps because the probable cause affidavit did not mention the traffic violation), the government did not argue in the district court that the traffic violation provided an independent probable cause basis for the stop, nor does it make this argument now. *See United States v. Cashman*, 216 F.3d 582, 586 (7th Cir. 2000).

waistband. Moore also reported the gunman wore blue jeans and a blue-collared shirt with a yellow band around the chest. Police took Moore to the scene of the traffic stop, and he identified Hampton as the individual with the large, silver handgun.

Later, officers discovered an orange Nissan Murano in the Subway parking lot with two bullet holes in the hood. Hampton's girlfriend testified at his trial that she had loaned the Murano to him and stated there had not been bullet holes in the vehicle before she gave him the car on the afternoon of July 13, 2006.

Before the trial, the district court denied Hampton's motion to suppress the Smith & Wesson chrome revolver, the gun he was charged with possessing. Following a two-day trial, a jury convicted Hampton. The court, applying the sentencing guidelines in combination with the ACCA, 18 U.S.C. § 924, determined Hampton's offense level was 34, his criminal history category a VI, and the resulting guidelines range a range of 262 to 327 months. It then chose to add four levels to Hampton's offense level in light of his extensive criminal history for a final offense level of 38. That resulted in a guidelines range of 360 months to life. Stating that the sentence would reflect an additional 60 months from the high end of the Guidelines range had it stayed at level 34, the court sentenced Hampton to 387 months' imprisonment.

II. ANALYSIS

A. Reasonable Suspicion Justified the Stop

First, Hampton appeals the district court's denial of his motion to suppress. Hampton argues that the officers lacked reasonable suspicion to stop the SUV

in which he was riding and that the 911 operators were not trained to establish reasonable suspicion. Second, Hampton challenges the reliability of Anthony Smith and argues that his 911 call failed to provide police with reasonable suspicion and therefore the stop was not justified because the call served as the only link between the shooting and a white SUV. Hampton submits that the emergency ended before Smith called and that even if the emergency remained ongoing, Smith's reliability was undercut because his tips were contradicted by facts known to the police, such as that the shooter was wearing black shorts and a black shirt. Hampton also contends that if 911 operators had asked Smith's name prior to stopping the Jeep, they would have learned that in 1998 he had been convicted of falsely reporting a shooting.

When reviewing a motion to suppress, we examine questions of law *de novo* and questions of fact for clear error. *United States v. Montgomery*, 555 F.3d 623, 629 (7th Cir. 2009). We review Hampton's stop under *Terry v. Ohio*, 392 U.S. 1 (1968). Police may initiate an investigatory stop when the officer has reasonable suspicion that a crime may be afoot. *Id.* at 30. When an officer makes a *Terry* stop, he must be able to point to "specific and articulable facts" that suggest criminality so that he is not basing his actions on a "mere hunch." *Id.* at 21; *United States v. LePage*, 477 F.3d 485, 487 (7th Cir. 2007). When reviewing the reasonableness of a *Terry* stop, we evaluate the totality of the circumstances. *Jewett v. Anders*, 521 F.3d 818, 824 (7th Cir. 2008).

We begin with Hampton's argument that Smith was an anonymous tipster whose call did not give rise to reasonable suspicion. In *Florida v. J.L.*, 529 U.S.

266 (2000), police frisked a man and found a gun after having received an anonymous call reporting that a black man wearing a plaid shirt at a particular bus stop had a gun. *Id.* at 268. The Supreme Court held that an anonymous tip must have indicia of reliability to justify a stop and concluded that because the tipster provided no "predictive information," the officers could not test the informant's knowledge or credibility so as to justify the stop and frisk. *Id.* at 271. Unlike *J.L.*, in which a single anonymous caller reported only possession of a gun, Smith and other callers reported multiple gunshots fired in broad daylight and a gunman on the loose. As we, and several of our sister circuits, have previously recognized, *J.L.* does not apply to emergency situations, so because we conclude that Smith's call reported an ongoing emergency, *J.L.* does not help Hampton. *See United States v. Hicks*, 531 F.3d 555, 558-59 (7th Cir. 2008) (collecting cases).

Smith's 911 phone call is much more like the situation presented in *United States v. Drake*, 456 F. 3d 771 (7th Cir. 2006). In *Drake*, a woman called 911 and reported that two groups of people in separate cars were involved in a disturbance and that each group had a gun. *Id.* at 772. She reported that a person in one of the cars pulled a gun on her son-in-law, and when the operator asked her name she provided it. *Id.* at 772-73. Officers recovered a gun after stopping one of the vehicles matching the description provided. *Id.* We held that when officers respond to a 911 call, there is less need for further verification of the caller's identity before acting because of the urgency of the situation. *Id.* at 775.

In *United States v. Hicks*, a 911 caller reported that a man involved in a domestic disturbance with a

woman had threatened her with a gun. *Hicks*, 531 F.3d at 557. The 911 call was fraught with inconsistencies and misrepresentations, for example, the caller initially gave a false name. *Id.* We reaffirmed *Drake*'s holding that emergency reports are presumptively reliable and concluded that the caller reported an ongoing emergency and "gave the 911 operator enough information to identify him and his location," which gave officers reasonable suspicion to stop the defendant and frisk him for a gun. *Id.* at 560. Hampton's case is also similar to the ongoing emergency presented in *United States v. Wooden*, 551 F.3d 647 (7th Cir. 2008). There, we held articulable suspicion supported a *Terry* stop when a 911 caller described a man and reported that the man had pulled a gun on his girl-friend during an argument outside a convenience store. *Id.* at 650.

Here too, we are confident that police faced an ongoing emergency when responding to Smith's call, and as such, Smith was presumptively more reliable than an anonymous tipster. Only five minutes had passed since the first 911 call and Smith's call. Three people in addition to Smith had called 911 and reported that at least five shots had been fired during the day in a residential and commercial area of Indianapolis, and the gunman had not yet been caught. Police were actively trying to find the gunman, whom callers reported had run from the scene.

Even if we agreed with Hampton that the emergency ended before Smith's 911 call, Smith still provided enough information so that the officers could test his knowledge or credibility so as to justify the stop and frisk. *See J.L.*, 529 U.S. at 271. Smith gave a location where the officers could meet him and hold him accountable if the information he gave was

false, and he also gave his name when asked even though the operator did not ask his name until after police stopped Hampton. *See Hicks*, 531 F.3d at 560. Smith provided the 911 operator with a play-by-play description of the "shooter's" movements and told the 911 operator he was afraid that the "shooter" could see him. The officer was able to verify Smith's story when he witnessed a white SUV with out-of-town plates driving in the location where Smith reported. There may have been some inconsistencies between Smith's report and the other 911 callers, but the callers all reported the same critical facts—that multiple gunshots had been fired, that two black men were involved in the shooting, that the shooter lurked between two buildings and that the shooter eventually left the parking lot on foot toward 38th Street. Although the operator did not ask Smith if he had witnessed the shooting, the fact that several other people had reported gunshots makes it reasonable for the operator to have believed that Smith had personally witnessed the shooting. Moreover, Smith was the only caller able to give detailed information about the gunman's current location, and he remained on the phone with the 911 operator until police stopped Hampton and made arrangements to meet with Smith. We reject Hampton's contention that if 911 operators had asked Smith his name earlier in the conversation, they would have learned that he had been convicted of false reporting and this fact would have made him less reliable. Emergency dispatchers are in no position to conduct background checks while gathering information about a crime in progress. *See Wooden*, 551 F.3d at 650 ("[T]he police are entitled to act on what is known at the time; information turned up later neither vindicates nor condemns a search.").

We also reject Hampton's argument that 911 operators, and not the police, concluded reasonable suspicion existed and ordered the stop. Rather, the 911 operators passed on information to the officers who used the specific and articulable facts told to them to determine they had reasonable suspicion. These facts came not only from Smith's call, but also all of the other 911 calls received regarding the shooting. Based on the information gathered in those 911 calls, the officers knew two black men were involved in a shooting in broad daylight in a busy area and that an SUV might be carrying the fleeing gunman from the area of the shooting near 38th and Pennsylvania streets. *See United States v. Whitaker*, 546 F.3d 902, 909 (7th Cir. 2008) (concluding reasonable suspicion existed where 911 center received two calls in close succession about an altercation at a store and at the scene officers found vehicles matching the description of one automobile given during one call). As made clear by Drawn's second call, 911 operators were in contact with police on the scene before Smith's call. Also, multiple operators were handling the incoming calls reporting the shooting, and the investigation was evolving rapidly. Smith's call described the current whereabouts of the gunman, and officers had no reason to disbelieve the information he was providing because it matched many of the details provided by other callers. *See United States v. Johnson*, 383 F.3d 538, 543 (7th Cir. 2004) ("With *Terry* stops relating to vehicles, such as the present case, the description, proximity of the vehicle to the suspected criminal activity and the proximity to the reported crime are two important factors to be considered in determining reasonable suspicion."). Officers needed to respond quickly to this ongoing threat to public safety, so under the totality of the

circumstances, the officers had reasonable suspicion to stop the Jeep in which Hampton was riding.

B. Sufficient Evidence Supported Hampton's Conviction

Hampton next claims the district court improperly denied his motion for judgment of acquittal based on insufficiency of the evidence, a decision we review de novo. *United States v. Quilling*, 261 F.3d 707, 712 (7th Cir. 2001). Hampton argues that the evidence presented at trial was insufficient because: (1) the government failed to establish constructive possession by Hampton; and (2) the testimony offered by Smith and Moore was inadequate to allow a reasonable jury to conclude Hampton actually possessed the gun.

Hampton bears a heavy burden in making an insufficiency of the evidence claim. *See United States v. Blanchard*, 542 F.3d 1133, 1154 (7th Cir. 2008). We review the evidence at trial in the light most favorable to the government and "will overturn a conviction based on insufficient evidence only if the record is devoid of evidence from which a reasonable jury could find guilt beyond a reasonable doubt." *United States v. Severson*, 569 F.3d 683, 688 (7th Cir. 2009) (internal quotation marks and citation omitted).

In order to sustain a conviction under 18 U.S.C. § 922(g)(1), the government needed to prove Hampton had either actual or constructive possession of the gun.[2] *Rogers*, 542 F.3d at 202. Actual possession

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[2] The government also needed to prove Hampton had a prior felony conviction and that the firearm traveled in or affected interstate commerce, facts to which Hampton stipulated before the trial. *See* § 922(g)(1); *see also United States v. Rogers*, 542 F.3d 197, 202 (7th Cir. 2008).

occurs when a defendant "knowingly maintains physical control over an object." *United States v. Stevens*, 453 F.3d 963, 965 (7th Cir. 2006). A defendant constructively possesses an item if he has the power and the intent to exercise dominion or control over the object, either directly or through others. *United States v. Thomas*, 321 F.3d 627, 636 (7th Cir. 2003). Constructive possession may be sole or joint, *see United States v. Morris*, 349 F.3d 1009, 1014 (7th Cir. 2003), but mere proximity to the object alone is not enough to prove knowledge of the item, *see Thomas*, 321 F.3d at 636. The government must "establish a nexus between the accused and the contraband, in order to distinguish the accused from a mere bystander." *Quilling*, 261 F.3d at 712 (citation omitted). The prosecution may prove actual or constructive possession by direct or circumstantial evidence. *See Morris*, 349 F.3d at 1014.

Hampton argues that the government only proved his mere proximity to the gun. Hampton attacks the witnesses' testimony because Smith claimed to have seen Hampton with a black gun, while Moore and the indictment stated Hampton's gun was chrome. Hampton argues that Moore's testimony was incredible as a matter of law and challenges whether Moore actually saw what he claimed to have seen because he was twenty-two floors above the scene. Hampton asserts that Moore described someone shooting at a building that showed no signs of bullet holes and that officers found bullet holes in the Nissan Murano which was located in the opposite direction from which Moore described seeing the suspect shoot.

The government presented sufficient evidence to show both constructive and actual possession of the gun. Police recovered two guns from the Jeep in

which Hampton was riding—a chrome Smith & Wesson near the rear seat and a black pistol under the seat of driver, Justin Gray. At trial, officers testified that Hampton emerged from the rear passenger seat of the vehicle on the driver's side and that the Smith & Wesson was found within Hampton's reach based on where he was seated in the vehicle. *See United States v. Wetwattana*, 94 F.3d 280, 283-84 (7th Cir. 1996) (constructive possession found when evidence showed that handgun was accessible and within defendant's reach and control). And, as discussed in more detail below, the government also established a nexus between the gun and Hampton through witness testimony that Hampton was holding a gun before he entered the Jeep. *See Stevens*, 453 F.3d at 966.

Even if we accept Hampton's position that the government's case for constructive possession was weak, the prosecution provided ample evidence to demonstrate actual possession. Both Smith and Moore described seeing Hampton holding a gun, and Moore testified that he saw Hampton place the gun in his waistband before he entered a white SUV. *See United States v. McNeal*, 900 F.2d 119, 121 (7th Cir. 1990) (circumstantial evidence was sufficient to establish that defendant knowingly possessed gun found in his car after police heard shots and then saw defendant's car traveling at high speed from direction where shots were fired). *But see United States v. Chairez*, 33 F.3d 823, 825 (7th Cir. 1994) (no constructive possession where government presented no evidence that defendant ever carried the gun and only offered evidence that defendant was a passenger in the car). We are not swayed by Hampton's argument that Smith described seeing Hampton with a black gun, while Moore testified he saw the shooter

with a silver one. Although it is possible Smith was incorrect about the color of the weapon, he never expressed any doubt that Hampton held a gun in his hand before being picked up by the Jeep's driver. Moreover, our role is not to reconcile inconsistencies in the witnesses' testimony. Hampton's attacks on Smith and Moore are merely an attempt to have us reweigh the evidence, something we may not do because it is the job of the jury to determine the credibility of the witnesses and the veracity of their stories. Hampton's attorney had the opportunity to cross-examine both Moore and Smith. Indeed, Moore admitted on cross-examination that he could not describe the people or objects pictured in photos taken by the defense from his vantage point on the day of the incident, and although Moore was able to describe what Hampton wore the day of the shooting, the district court wisely barred Moore from making an in-court identification of Hampton because of his distance from the scene. Despite the holes the defense poked in the witnesses' stories, the jury chose to believe their testimony, and we cannot disturb its determinations. *United States v. Rollins*, 544 F.3d 820, 835 (7th Cir. 2008) ("It is up to the jury to weigh the evidence and determine the credibility of the witnesses; we do not second-guess the jury's assessment of the evidence."). We, therefore, reject Hampton's sufficiency of the evidence challenge.

C. Criminal Recklessness Conviction Not a Violent Felony

The district court sentenced Hampton under the ACCA after determining that Hampton had committed three "violent felon[ies]" within the meaning of 18 U.S.C. § 924(e)(2)(B); *see also* U.S.S.G. § 4B1.4(a). At sentencing, Hampton argued that one of his prior

convictions, an Indiana conviction for residential entry, did not qualify as a predicate felony under the ACCA. Relying on *United States v. Gardner*, 397 F.3d 1021, 1024 (7th Cir. 2005), which held Indiana's offense of residential entry is a "crime of violence" under § 4B1.2(a) of the United States Sentencing Guidelines because residential entry "entails an entry into a residence without permission and presents the same risk [as burglary] of encountering an occupant," the district court rejected this argument. However, after Hampton's sentencing, the Supreme Court decided *Begay v. United States*, 128 S. Ct. 1581 (2008), which shed new light on applying recidivist sentencing enhancements. Now, Hampton argues that post-*Begay*, residential entry no longer qualifies as a "violent felony," and that he should be resentenced. We review de novo a district court's determination that a prior conviction is a "violent felony." *See United States v. Smith*, 544 F.3d 781, 783 (7th Cir. 2008).

The ACCA states that:

> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

18 U.S.C. § 924(e)(2). In 1996, Hampton was convicted under Indiana's residential entry statute, which provides that: "[a] person who knowingly or inten-

tionally breaks and enters the dwelling of another person commits residential entry, a Class D felony."

Ind. Code § 35-43-2-1.5. Because residential entry does not have an element of use of physical force as required to fall under subsection (i) of § 924(e)(2)(B) and is not among the listed offenses in subsection (ii), we must analyze the offense under the residual clause of subsection (ii) that captures crimes involving "conduct that presents a serious potential risk of physical injury to another."

We turn first to *Begay*, in which the Supreme Court examined the ACCA provision that imposes a fifteen-year mandatory minimum sentence upon felons who unlawfully possess a firearm and who have three or more previous convictions for certain drug crimes or "violent felon[ies]." *Begay*, 128 S. Ct. at 1583 (citing 18 U.S.C. § 924(e)(1)). The Court determined that a defendant's prior conviction for driving under the influence of alcohol ("DUI") did not constitute a "violent felony" under the Act's definition. *Id.* at 1588. The Court found that DUI, in order to be a "violent felony," must fall within the scope of the residual clause of other crimes involving a serious potential risk of physical injury to another. *Id.* at 1584. The Court concluded that DUI falls outside of the scope because it is too unlike the ACCA's listed offenses and reasoned that the examples given were limited to "crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves." *Id.* at 1585. The Court explained that DUI differed from the enumerated offenses because "the listed crimes all typically involve purposeful, violent and aggressive conduct," and the DUI statute was more like a strict liability offense. *Id.* at 1586 (internal quotation marks omitted).

In light of these principles, we now turn to whether the crime of residential entry in Indiana meets the definition of a "violent felony" under the residual clause. In doing so, we must look to the statutory definition of residential entry and not the underlying facts of Hampton's prior conviction. *See Chambers v. United States*, 129 S. Ct. 687, 690 (2009); *Taylor v. United States*, 495 U.S. 575, 600 (1990). We note that although the offense of residential entry is listed in the same chapter as burglary in the Indiana Code, residential entry does not meet the definition of a generic burglary because residential entry does not require the intent to commit a felony therein. *See Taylor*, 495 U.S. at 599. However, the requirement that one must intend to commit a felony inside the home in order to be convicted of burglary is not dispositive. The real inquiry under the residual clause is whether the offense prohibits conduct that "presents a serious potential risk of physical injury to another." *See id.* at 600 n.9 ("The Government remains free to argue that any offense—including offenses similar to generic burglary—should count towards enhancement as one that 'otherwise involves conduct that presents a serious potential risk of physical injury to another' under § 924(e)(2)(B)(ii)."). We conclude that residential entry is similar in risk to the enumerated offense of burglary because both create a substantial risk that if the offender is confronted by someone inside the home, violence will ensue. *See United States v. Spells*, 537 F.3d 743, 752 (7th Cir. 2008) (fleeing from an officer in a vehicle qualifies as a "violent felony" because statute requires knowing and intentional conduct and because of the risk of danger posed to nearby bystanders and officers); *see also United States v. Scoville*, 561 F.3d 1174, 1180 (10th Cir. 2009) (prior convictions for

third-degree burglary, which prohibited trespassing in an occupied structure or habitation with the purpose of committing any criminal offense or misdemeanor, qualified as a "violent felon[ies]" because "the risk posed is similar to that of generic burglary"). Indeed, when pressed at oral argument, Hampton's counsel could not give an example of a residential entry that is less likely to precipitate violence than a burglary. Moreover, residential entry constitutes the type of intentional conduct that *Begay* requires—the statute itself requires "knowingly or intentionally" breaking and entering into someone's home. Ind. Code § 35-43-2-1.5; *see also Begay*, 128 S. Ct. at 1587. Additionally, the act of intentionally breaking into another person's home, regardless of the unwanted intruder's intention once inside, is inherently aggressive and creates a serious risk that the homeowner may resort to violence to defend himself or his loved ones. "The main risk of burglary arises not from the simple physical act of wrongfully entering another's property, but from the possibility that an innocent person might confront the burglar during the crime." *James v. United States*, 550 U.S. 192, 194 (2007) (holding that attempted burglary qualifies as a "violent felony" under the ACCA). For these reasons, residential entry qualifies as a "violent felony" within the meaning of the ACCA.

Although we conclude that residential entry qualifies as a predicate violent felony, our inquiry does not end there. Upon reviewing the record, we discovered that one of Hampton's other prior convictions, an Indiana conviction for criminal recklessness, similarly presents a *Begay* problem. At sentencing, the district court relied on three of Hampton's prior felony convictions to sentence him as an armed career criminal-resisting law enforcement, residential

entry and criminal recklessness, a class D felony under Indiana Code § 35-42-2-2. Neither of the parties identified Hampton's 1992 conviction for criminal recklessness as an issue in the district court or on appeal. But, until we decided otherwise in *United States v. Smith*, a case issued after Hampton was sentenced, a conviction in Indiana for criminal recklessness served as a predicate violent felony under the ACCA. 544 F.3d 781, 787 (7th Cir. 2008); *United States v. Jackson*, 177 F.3d 628, 633 (7th Cir. 1999) (Indiana conviction for criminal recklessness qualified as "crime of violence"). Our recent post-*Begay* precedent has further illuminated the proper analysis for determining whether a prior conviction qualifies for a recidivist enhancement. *See United States v. Woods*, 576 F.3d 400, 401 (7th Cir. 2009) (reiterating *Smith*'s holding); *see also United States v. High*, 576 F.3d 429, 430 (7th Cir. 2009) (plain error occurs if a district court incorrectly classifies a defendant's prior conviction as a violent felony).

We asked both parties to file statements of position to address how *Smith* and *Woods* applied to the criminal recklessness conviction relied on by the district court to sentence Hampton as an armed career criminal. The government contends that Hampton has waived this issue, thus precluding our review. Waiver however, requires the intentional relinquishment or abandonment of a known right. *United States v. Sumner*, 265 F.3d 532, 537 (7th Cir. 2001). *Begay*, *Chambers*, *Smith*, and *Woods* were all decided after Hampton was sentenced, and all but *Begay* were decided after Hampton's opening brief was filed. We construe waiver principles liberally in favor of defendants, *id.*, and doing so here requires finding that Hampton has forfeited, rather than waived, this issue. Counsel's decision not to pursue

this issue was not intentional. Neither party noticed the problematic reliance on the criminal recklessness conviction as a basis for enhancement, and Hampton never affirmatively waived the argument. This case is not like *United States v. Foster*, 577 F.3d 813, 815-16 (7th Cir. 2009), where defense counsel at oral argument affirmatively waived any argument that a prior Indiana criminal recklessness conviction was not a crime of violence. Hampton certainly did not waive it in this court, and there is no evidence in the record that Hampton waived the issue in the district court.

The government concedes that if there was no waiver a remand would be necessary, and we agree. Forfeiture, the failure to make a timely assertion of a right, permits plain error review. *Sumner*, 265 F.3d at 537. In light of *Begay* and its progeny, the district court committed plain error when it enhanced Hampton's sentence based on the determination that criminal recklessness in Indiana constituted a violent felony under the ACCA. Without Hampton's criminal recklessness conviction, he does not have the requisite number of felony convictions to qualify for the sentence enhancement. Hampton's classification as an armed career criminal subjected him to a statutory minimum sentence of fifteen years and also increased his offense level under the Guidelines from Level 28 to Level 34. *See* 18 U.S.C. § 924(e)(1); U.S.S.G. § 4B1.4. So, we remand his case for resentencing. *Cf. Greenlaw v. United States*, 128 S. Ct. 2559, 2566 (2008) ("This Court has indeed noticed, and ordered correction of, plain errors not raised by defendants, but we have done so only to benefit a defendant who had himself petitioned the Court for review on other grounds."); *DeRoo v. United States*, 223 F.3d 919, 926-27 (8th Cir. 2000) (raising, *sua*

sponte, that prior conviction did not count as predicate offense under ACCA and remanding for resentencing).

III. CONCLUSION

Therefore, we AFFIRM Hampton's conviction, but VACATE his sentence and REMAND his case for resentencing.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 07-3134
District Court No: 1:06-cr-00183-JDT-1
Southern District of Indiana, Indianapolis Division
District Judge John Daniel Tinder

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTHONY HAMPTON,
Defendant-Appellant.

BEFORE:

FRANK H. EASTERBROOK, *Chief Judge*

RICHARD A. POSNER, *Circuit Judge*

ANN CLAIRE WILLIAMS, *Circuit Judge*

November 4, 2009

FINAL JUDGMENT

Hampton's conviction is AFFIRMED, but his sentence is VACATED and the case is REMANDED for resentencing. The above is in accordance with the decision of this court entered on this date.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

No. 07-3134
Appeal from the United States District Court
for the Southern District of Indiana
No. 06 CR 183
John Daniel Tinder, *Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTHONY HAMPTON,
Defendant-Appellant.

BEFORE:

FRANK H. EASTERBROOK, *Chief Judge*

RICHARD A. POSNER, *Circuit Judge*

ANN CLAIRE WILLIAMS, *Circuit Judge*

December 3, 2009

ORDER

On consideration of the petition for panel rehearing filed by Petitioner-Appellant on November 18, 2009, all members of the original panel have voted to DENY the petition for rehearing. No judge in regular

active service requested a vote on the petition for rehearing en banc.[1]

Accordingly, the petition for rehearing is DENIED.

[1] Circuit Judge Tinder took no part in the consideration of this petition for rehearing en banc.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IP 06-183-CR-01 T/F

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ANTHONY HAMPTON,
Defendant.

ENTRY ON MOTION TO SUPPRESS[1]

Defendant Anthony Hampton is charged in the indictment with possession of a firearm as a convicted felon. He moves to suppress the evidence seized or obtained in the search of the vehicle in which he was a passenger, contending that the stop was unreasonable and violated his Fourth Amendment rights. The court has considered the Defendant's motion, supporting memorandum, the audio recordings of the 911 calls, the "incident history details," and the government's response.

I. Background

On July 13, 2006, beginning about 4:30 p.m. and within minutes thereafter, several 911 calls reported that gunshots were fired in the area of 38th and

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[1] This Entry is a matter of public record and will be made available on the court's web site. However, the discussion contained herein is not sufficiently novel to justify commercial publication.

Meridian streets in Indianapolis, Indiana. The first three calls were virtually simultaneous and apparently received by three different dispatchers. The first caller identified herself and reported that a string of gunshots, "like five," were fired at the side of her apartment at 3777 North Meridian Street, that two black males were involved and that they ran in and out of an SUV and walked by the Subway, heading toward 38th Street. The caller said that one of them was wearing a black shirt and shorts, but she could not recall what the other was wearing. The second caller identified himself and said that six or seven shorts were fired in the parking lot on the south side of 38th at the corner of Meridian, and that he saw a black man wearing a dark, short sleeve shirt running with a gun in his hand. The second caller could not provide a further description because he was on the 19th floor of his apartment building. Another person called from inside the Subway store at 38th and Meridian and reported "a whole lot a shooting" behind the restaurant. The first caller called again approximately two minutes after her first call report that police had arrived and one of the men involved in the shooting had just walked by the officers and he was wearing a black shirt and black shorts with beads in his hair.

Approximately five minutes after the first calls were placed, a person, now known to be Anthony Smith, called 911 and said that he was at 38th Street and Pennsylvania and looking right at "the guy who did the shooting." He described a black male on a cell phone, wearing a blue shirt with stripes and jeans, standing between two buildings at the southwest corner of 38th and Pennsylvania, close to where the shots were fired. For some time, Mr. Smith relayed the shooter's movements, which included running

across and down the street. Mr. Smith then reported that the shooter entered a white SUV, a Jeep Cherokee, with Ohio plates, that then traveled northbound on Pennsylvania and turned right onto 40th Street.

Within less than one minute, police officers stopped a white Cherokee bearing Ohio license plates at 40th Street and Washington Boulevard. The Jeep was occupied by two black men. Anthony Hampton was seated in the passenger seat of the vehicle and was sweating profusely. He was wearing a blue shirt with yellow stripes on the front. Officers searched the vehicle and found a gun. Mr. Hampton was arrested and charged with possession of the gun.

The Defendant contends that the stop of the Jeep was unreasonable. He does not contest the subsequent search of the vehicle (Mem. Supp. Mot. Suppress 4-5, 7) but, rather, contends that the stop was unjustified so the limited search of the vehicle never should have occurred.

II. Discussion

A defendant has standing to suppress evidence only if his Fourth Amendment rights were violated by the challenged search or seizure. *United States v. Padilla*, 508 U.S. 77, 81 (1993); *Rakas v. Illinois*, 439 U.S. 131, 133-34, n. 1 (1978). The Supreme Court has not yet addressed whether a passenger in a vehicle that is subject to a stop is seized for Fourth Amendment purposes such that he may challenge the legality of the stop. A few weeks ago, however, the Court heard oral argument in *Brendlin v. California*, No. 06-8120, 127 S. Ct. 1145 (U.S. Apr. 23, 2007), in which this very question is presented.

The Seventh Circuit has recognized that a passenger in a vehicle has standing to challenge the stop of the vehicle, see *United States v. Powell*, 929 F.2d 1190,

1195 (7th Cir. 1991), *cert. denied*, 502 U.S. 981 (1991), and a majority of the circuit courts agree, *see, e.g., United States v. Mosley*, 454 F.3d 249, 252-53 (3d Cir. 2006) ("it is settled law that a traffic stop is a seizure of everyone in the stopped vehicle"); *United States v. Twilley*, 222 F.3d 1092, 1095 (9th Cir. 2000) ("a passenger may challenge a stop of a vehicle on Fourth Amendment grounds even if she has no possessory or ownership interest in the vehicle."). Therefore, the court finds that the Defendant, a passenger in the vehicle stopped, may challenge the stop and seek to suppress the fruits of the seizure. *See Mosley*, 454 F.3d at 253.

It is well-established that a police officer may conduct a brief, investigatory stop when he "has a reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). Reasonable suspicion "is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, . . . [but] requires at least a minimal level of objective justification for making the stop." *Wardlow*, 528 U.S. at 123. Reasonable suspicion may be based on an informant's tip if the tip carries sufficient "indicia of reliability." *Alabama v. White*, 496 U.S. 325, 328-29 (1990).

"With *Terry* stops relating to vehicles . . . the description, proximity of the vehicle to the suspected criminal activity and the proximity to the reported crime are . . . important factors to be considered in determining reasonable suspicion." *United States v. Johnson*, 383 F.3d 538, 543 (7th Cir. 2004); *see also United States v. Wimbush*, 337 F.3d 947, 950 (7th Cir. 2003) (holding officer had reasonable suspicion to stop vehicle where the driver matched the description

of the suspect, the vehicle matched the description of the one driven by the suspect, and the shooting "had occurred only minutes earlier in an area just eight blocks away"); *United States v. Swift*, 220 F.3d 502, 507 (7th Cir. 2000) (reasonable suspicion supported *Terry* stop of red Jeep Cherokee with two black men inside where witnesses reported bank was robbed by two black men who escaped in a red Jeep and stopped Jeep's license number began with same two numbers as were reported by witnesses).

Mr. Hampton likens this case to *Florida v. J.L.*, 529 U.S. 266 (2000), in which the Supreme Court addressed whether an anonymous tip is sufficient to provide reasonable suspicion to justify a *Terry* stop. In *J.L.*, an anonymous caller reported to the police that a young black man standing at a particular bus stop, wearing a plaid shirt was carrying a gun. Nothing was known abut the informant and no audio recording of the call was made. *Id.* at 268. Two officers arrived at the bus stop a short time later and saw three black men, one of whom, J.L., was wearing a plaid short. The officers had no reason to suspect any illegal activity other than form the tip. The officers frisked J.L. and found a gun. J.L. was charged with a gun offense and moved to suppress the gun as the fruit of an unlawful search. *Id.* at 268-69.

The Supreme Court held that the anonymous tip that a person was carrying a gun lacked sufficient indicia of reliability so as to justify a *Terry* stop. *J.L.*, 529 U.S. at 270-74. The Court said that "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity," but also recognized that situations exist in which such a tip "suitably corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to make the investigatory

stop.'" *Id.* at 270 (quoting *White*, 496 U.S. at 327)). The Court expressed concern about the reliability of a tip that described only "a subject's readily observable location and appearance[.]" *Id.* at 272. While such a tip would help police identify the person accused, it "does not show that the tipster has knowledge of concealed criminal activity." *Id.* Thus, the Court stated that reasonable suspicion "requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *Id.*

The circumstances of this case show that the information given by Mr. Smith was more reliable than the tip provided in *J.L.* Courts, including the Seventh Circuit, find 911 emergency calls more reliable than an anonymous tip about general criminal activity. *See, e.g., United States v. Drake*, 456 F.3d 771, 774-75 (7th Cir. 2006); *United States v. Terry-Crespo*, 356 F.3d 1170, 1172, 1176 (9th Cir. 2004). The *Drake* court "presumed the reliability of an eye-witness 911 call reporting an emergency situation for purposes of establishing reasonable suspicion, particularly when the caller identifies herself." *Id.* at 775. This is in recognition that officers have a particular duty "to speedily respond to emergency situations reported by individuals through the 911 system." *Id.* at 774. Thus, under *Drake*, even an anonymous eye-witness 911 call reporting an emergency situation presumptively is reliable enough to provide reasonable suspicion; the reliability is enhanced if the caller identifies himself. Mr. Smith provided the information to police in the context of a 911 call; the tip in *J.L.* did not come through a 911 emergency call. The reliability of Mr. Smith's 911 call is presumed because he was reporting an emergency situation.

Mr. Smith claimed to be looking right at the guy who did the shooting. He described a black male on a cell phone, wearing a blue shirt with stripes and jeans, standing between two buildings at the southwest corner of 38th Street and Pennsylvania. For some time, Mr. Smith remained in continuous contact with the 911 dispatcher and relayed the shooter's movements, which included hiding between two buildings at the corner of 38th and Pennsylvania, within close proximity of where the shots were fired, and running down the street. Mr. Smith then reported that the shooter was bald and entered a white SUV, a Cherokee, with Ohio plates, which then traveled northbound on Pennsylvania Street and then turned onto 40th Street. Although Smith did not report that he witnessed the gun shots, he personally observed the subsequent movements of the man he identified as the shooter. And his 911 call was placed contemporaneously with the unfolding of events surrounding the multiple shots incident.

Furthermore, Mr. Smith's call must be viewed in its context of four other 911 calls reporting gun shots at 38th and Meridian. Three separate callers placed four 911 calls (the first caller called 911 twice) and reported several gunshots in the area of 38th and Meridian, an intersection with an apartment building, a small strip mall that includes a Subway shop, and other stores. Two of the callers indicated that one or two black men were involved in the shooting. The first caller identified herself by name and address. She reported that "like five" shots were fired outside her apartment, that two black males were involved, and that they were going in and out of an SUV. She described one's clothing as a black shirt and shorts but could not recall the other's clothing. The second caller identified himself by name, location

and phone number. He stated that six to seven shots were fired, that he saw a black male wearing a dark short sleeve shirt, running with a gun in his hand, and gave a description of the clothing of one of the males consistent with that given by the first caller. The third caller called from inside the Subway store at the intersection of 38th and Meridian and reported a "lot of shooting." The caller did not see the shooting but heard the shots. Each of these callers gave consistent accounts of the timing, location, and occurrence of multiple gun shots. The first two callers who observed the events gave consistent reports that two black men were involved. Their descriptions of the clothing worn by one were consistent as well.

These 911 callers' accounts provided reliable information that criminal activity had just occurred, *see Drake*, 456 F.3d at 774-75, and their corroboration of information provided by the others enhances that reliability, *see United States v. Anderson*, 339 F.3d 720, 723-24 (8th Cir. 2003) (corroboration of information about a crime provided by more than one witness suggests that the information is reliable). All of the 911 calls establish that there was an ongoing, dangerous situation requiring immediate police action. Multiple shots had been fired in broad daylight on the city streets of Indianapolis, just outside an apartment building, a Subway store, and other stores. The two men involved in the shooting were on the loose, and apparently at least one had a gun. Without a doubt, the firing of multiple gun shots posed an immediate threat to the public safety. Moreover, it is significant that three of the 911 calls were placed virtually simultaneously and all five calls were placed within five minutes of the others. Several different 911 dispatch operators were involved and conveyed the information received to the police. Thus, within a

very brief period of time officers received multiple pieces of information about the shooting through several 911 operators. The officers had to piece the information together and react quickly to an urgent and unfolding situation.

Aside from the fact that Mr. Smith provided information in a 911 call, he is unlike the anonymous tipster in *J.L.* Although Mr. Smith did not identify himself by name until after the vehicle in which Mr. Hampton was a passenger had been stopped by police, Smith provided other information which makes his tip more reliable than the tip in *J.L.*[2] Mr. Smith gave his location (38th and Pennsylvania). While Mr. Smith was at first reluctant to meet with police, he indicated the reason why—he was staring at the shooter and the shooter was staring at him. He obviously was concerned for his safety. A few minutes later and before the vehicle was stopped, Mr. Smith agreed to meet with an officer and gave the 911 operator an address, 3845 Pennsylvania, where an officer could meet him. And importantly, Mr. Smith remained on the 911 call until after the vehicle had been stopped. Thus, he was in constant contact with the police through the 911 call up to and including the time the stop had been made. Also, significantly, the call was recorded. The recording confirms that Mr. Smith actually placed the 911 call and provided information which supported the vehicle stop. Thus, there is no concern here that the police concocted an

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[2] The court considers the totality of the circumstances known to the officers only at the time they stopped the vehicle, not any information they obtained after the initial stop, which did not inform the decision to stop the vehicle. *J.L.*, 529 U.S. at 271. Mr. Smith was not asked for his name before the stop occurred. When the 911 operator first asked for his name, he readily provided it.

anonymous tip to justify the vehicular stop. The Supreme Court in *J.L.* seems to have had such a concern since it pointed out that the record revealed no audio recording of the tip or any information about the informant. *J.L.*, 529 U.S. at 268.

Moreover, Mr. Smith's identification of the shooter was corroborated generally by two of the 911 callers. Those eyewitnesses reported that a black man or two black men were involved in the gun shots at 38th and Meridian, and one indicated that the men were going in and out of an SUV. Mr. Smith, located at 38th and Pennsylvania, one block over, also identified the shooter as a black man and reported that he got into an SUV.

The 911 callers including Mr. Smith provided the officers with sufficient details to identify the suspected shooter and the vehicle in which he was a passenger. When the officers stopped the white Jeep Cherokee with Ohio plates at 40th and Pennsylvania, they had no reason to doubt that the Cherokee was the SUV identified by two 911 callers or that one of the men inside was responsible for multiple gun shots fired minutes before at 38th and Meridian. The SUV was ultimately stopped within a few blocks from where Mr. Smith was when he observed the shooter enter it and its direction of travel was that reported by Smith. Indeed, the Cherokee was stopped just blocks from where the gun shots reportedly were fired. The clothing worn by Mr. Hampton, the passenger of the Cherokee—a blue shirt with yellow stripes—was consistent with that described by Mr. Smith. Perhaps the officers could make out the race and gender of the persons inside the SUV and could see the striped shirt before making the stop. If so, their own observations gave them further reason to credit the information provided by Mr. Smith's 911 call. And

once the officers stopped the vehicle and approached, they were able to observe the two occupants and determine they were two black men. The officers also were able to see that one of the men was wearing clothing as described by Mr. Smith and was sweating profusely, as one would expect from someone who had been running through the streets just moments before. These observations coupled with the information provided by Mr. Smith and the other 911 callers gave the officers reasonable suspicion to detain the vehicle and men for a brief investigation.

III. Conclusion

The court finds that the information provided by Mr. Smith in the 911 call carried sufficient indicia of reliability, particularly when considered along with the information provided by the other 911 callers. The officers therefore had a reasonable suspicion justifying the stop of the Jeep Cherokee in which the Defendant was a passenger. Accordingly, the court DENIES the Defendant's Motion to Suppress (Doc. No. 19).

ALL OF WHICH IS ENTERED this 14th day of May 2007.

/s/

John Daniel Tinder, Judge
United States District Court

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APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IP 06-183-CR-01 T/F

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ANTHONY HAMPTON,
Defendant.

ENTRY ON DEFENDANT'S MOTION TO RECONSIDER RULING ON MOTION TO SUPPRESS (DOC. NO. 35)[1]

The Defendant moved to suppress evidence seized or obtained in the search of a vehicle in which he was a passenger on the grounds that the stop of the vehicle was unreasonable and violated his constitutional rights. The court denied the motion in its Entry on Motion to Suppress (Doc. No. 29). The Defendant has filed a motion to reconsider that ruling, raising three main points. The court addresses each in turn.

1. The Defendant contends that the reasonableness of the vehicle stop is determined solely with reference to the reliability of Anthony Smith's description to

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[1] This Entry is a matter of public record and will be made available on the court's web site. However, the discussion contained herein is not sufficiently novel to justify commercial publication.

the 911 operator. However, the reasonableness of the stop of the vehicle in question, like any seizure for Fourth Amendment purposes, is determined based on the totality of the circumstances presented to the officer or officers at the time of the stop. *See United States v. Arvizu*, 534 U.S. 266, 273 (2002) (in determining whether reasonable suspicion exists for an investigatory stop courts "must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing"); *United States v. Askew*, 403 F.3d 496, 507 (7th Cir. 2005); *see also* Entry on Motion to Suppress 9 n. 2. Here, the totality of the circumstances includes not only the information from Smith's 911 call as reported to police, but also the information from the other 911 calls that also was reported to police. (*See* Entry on Mot. Suppress 7-9.) Moreover, the vehicle in which Mr. Hampton was a passenger was stopped within a few blocks of the location of where the shots were reportedly fired and within minutes of the reported shooting. These facts are important in the reasonable suspicion determination. (*See* Entry on Mot. Suppress 4-5, and cases cited therein.) While Smith may be the only caller to link the shooter to a white SUV with Ohio plates, the first caller reported that two black males were involved and linked them to an SUV. This report corroborates very generally Smith's identification of an SUV as the vehicle used by the shooter. While the first caller may have mistakenly referred to an orange Murano automobile as an SUV, the reasonableness of the stop of the Cherokee does not hinge on any corroboration by another 911 caller as to the make or color of the vehicle. Smith's report alone was reliable. And there is more. Smith's information was corroborated by the officers' own

observations of a white Jeep Cherokee traveling on the city streets as Smith reported.

2. The Defendant argues that the facts of this case are distinguishable from *United States v. Drake*, 456 F.3d 771, 774-75 (7th Cir. 2006), because the 911 caller was describing an ongoing offense, whereas, Smith was reporting a suspect's movements after the emergency was over. Reasonable minds could readily disagree with the assessment that the emergency had passed. That is a far too narrow view of the nature of the ongoing events. It is reasonable to conclude that the firing of multiple gunshots in a densely populated residential area (including a high rise apartment building and a nearby strip mall), and presumably innocent people, even in broad daylight is an emergency situation. And, as he court noted in its Entry, the two men allegedly involved in the shooting were on the loose and witnesses had seen a man running with a gun. (*See* Entry 8.) These facts do not suggest that all danger was over.

3. While *United States v. Colon*, 250 F.3d 130 (2nd Cir. 2001) held that the knowledge of a civilian 911 operator could not be imputed to law enforcement without any evidence that the operator made any assessment of reasonable suspicion or was trained to do so. *Id.* at 134-37. The case is inapposite. In *Colon* the operator had additional knowledge that was never conveyed to the dispatcher; without this additional information, the officers lacked reasonable suspicion. There is no suggestion here that the 911 operator who spoke with Smith had any information without which reasonable suspicion was wanting and that such information was not conveyed to law enforcement.

The Defendant suggests that the 911 operator's assessment of the truth and reliability of the information relayed by Smith was the basis for the vehicle stop. It is not the operator's assessment of reliability that matters. As noted in the Entry, even an anonymous eye-witness 911 call reporting an emergency situation presumptively is reliable enough to provide reasonable suspicion to support a *Terry* stop. (Entry 6.) And as noted (Entry 10), the information provided by Smith was corroborated by the officers' own observations—if not by their observations of the vehicle's occupants and/or their clothing, then by their observation of the Cherokee as it traveled the same route reported by Smith, in a location in close proximity to the scene of the shooting and within minutes of that shooting.

Accordingly, the Defendant's motion to reconsider ruling on motion to suppress (Doc. No. 35) is DENIED.

ALL OF WHICH IS ENTERED this 18th day of May 2007.

/s/ _____
John Daniel Tinder, Judge
United States District Court

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